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Employment at Will - Limitations on Employers' Freedom to Terminate

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perpetuate, if not increase, the divergence in lower court treatment of sex-based classifications.

Even though the Court fails to clearly indicate its present position on sex discrimination, one message of these recent cases is unmistakeable—sex, at least for the present, is not suspect. Perhaps a majority of the Court wishes to decide sex discrimination cases on an ad hoc basis, withholding a final resolution of the issue of suspectness until the country reaches its decision on the Equal Rights Amendment.[50] Justice Powell expressed this view in his concurrence in *Frontiero*:

> It seems to me that the reaching out to preempt by judicial action a major political decision which is currently in the process of resolution does not reflect appropriate respect for the duly prescribed legislative processes.[51]

For the present, a more precise articulation of the components of the intermediate model, if indeed the Court is employing one, is needed to provide more definite guidelines for the lower courts. A definitive explication of the applicability of the test to sex-based classifications would significantly subdue the confusion stemming from the *Kahn*, *Geduldig*, and *Schlesinger* decisions.

Victor Lynn Marcello

EMPLOYMENT AT WILL—LIMITATIONS ON EMPLOYERS' FREEDOM TO TERMINATE

A married female employee sued her employer for damages for breach of an oral contract of employment which was terminable "at will" by either party. Hostility on the part of the plaintiff's foreman resulting from her refusal to go out with him was alleged by plaintiff to be the cause of her dismissal. Affirming the trial court, the New Hampshire supreme court held the employer liable for damages, reasoning that a termination by the employer of an at will employment contract "which is motivated by bad faith or malice or based on

50. The ERA provides: "Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article. Section 3. This amendment shall take effect two years after the date of ratification." S.J. Res. 8, 92d Cong., 2d Sess., 118 CONG. REC. 9598 (1972); H.R.J. Res. 208, 92d Cong., 1st Sess., 117 CONG. REC. 35815 (1971). The states have until March 22, 1979, to ratify the amendment.

51. Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, J., concurring).

retaliation . . . constitutes a breach of the employment contract."[1] *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974).

The traditional rule that a contract for an uncertain duration is terminable at will by either party without reference to motive[2] has been applied to employment contracts.[3] Although the employment relationship is a species of contract,[4] legislatures, seeking to prevent discrimination based on age,[5] sex,[6] or race,[7] to protect the right to unionize,[8] or to foster various other policies,[9] have on occasion intervened to protect at will employment contracts from termination. In the absence of legislation, however, the courts have usually followed the general rule and thus have afforded little protection to at will employment contracts.[10]

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1. Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974). The court, however, disallowed the portion of the award which included damages for mental suffering on the basis that such damages are not generally recoverable in a contract action. *Id.* at 552. In Louisiana, such damages may be awarded in a contract action. Lewis v. Holmes, 109 La. 1030, 34 So. 66 (1903).

2. *See, e.g.*, E. I. DuPont de Nemours & Co. v. Claiborne-Reno Co., 64 F.2d 224 (8th Cir. 1933); Kraftco Corp. v. Kolbus, 274 N.E. 2d 153 (Ill. App. 4th Dist. 1971); McGuire v. Nelson Bros., 177 La. 302, 148 So. 56 (1933); Stonega Coke & Coal Co. v. Louisville & Nashville R.R., 106 Va. 223, 55 S.E. 551 (1906).

3. *See, e.g.*, Hickman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917); Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908); Union Labor Hosp. Ass'n v. Vance Redwood Lumber Co., 158 Cal. 551, 112 P. 886 (1910); Lambert v. Georgia Power Co., 181 Ga. 624, 183 S.E. 814 (1936); Pechon v. National Corp. Serv., 234 La. 397, 100 So. 2d 213 (1958); Garner v. Louisiana State Bd. of Education, 277 So. 2d 492 (La. App. 1st Cir.), *writ denied*, 279 So. 2d 696 (La. 1973); RESTATEMENT OF TORTS § 762 (1939); S. WILLISTON, LAW OF CONTRACTS § 39 (1938). *Cf.* LA. CIV. CODE art. 2747: "A man is at liberty to dismiss a hired servant attached to his person or family, without assigning any reason for so doing. The servant is also free to depart without assigning any cause."

4. *See, e.g.*, Comment, 23 BUFFALO L. REV. 211 (1973).

5. *E.g.*, Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a) (1970).

6. *E.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (Supp. 1972).

7. *Id.*

8. *E.g.*, National Labor Relations Act, 29 U.S.C. § 158(a)(3) (1970).

9. *E.g.*, Consumer Credit Protection Act, 15 U.S.C. § 1674 (1970) (prohibiting discharge because an employee's wages have been garnished); Universal Military Training & Service Act, 50 U.S.C. § 459(c) (1970) (assuring returning veterans their former employment with the right not to be discharged except for just cause for one year after their return); LA. R.S. 23:961 (1950) (prohibiting employers with 20 or more employees from terminating employment because of employee's political activities). *Cf.* LA. R S. 23:962 (1950) (prohibiting employer from discharging employee prior to expiration of term of employment because of employee's political opinions and from attempting to control employee's vote by means of agreement).

10. *See* cases cited in note 3 *supra*. Although one would expect to find an analogy between the employer-employee and the landlord-tenant situations in that both are arrangements in which one party traditionally has enjoyed an advantage over the

Nevertheless, in at least two cases, strong public policy considerations have prompted the court's refusal to recognize the employer's right to terminate at will. In *Frampton v. Central Indiana Gas Co.*,[11] the Indiana supreme court awarded damages to an employee who was fired in retaliation for exercising her statutory right to collect workmen's compensation benefits from her employer. A discharge because of an employee's refusal to commit perjury at the insistence of his employer was considered actionable by the California appellate court in *Petermann v. Teamsters Local 396*.[12] Both courts emphasized that the policies sought to be protected were of sufficient weight to have been buttressed by civil or criminal legislation[13] and thus were willing to create a narrow exception to the traditional rule.

The decision in the instant case could be viewed as a further, although broadened, recognition of the tendency to limit the power of termination in favor of countervailing notions of public policy. It could be argued that the interest in discouraging inducements by the employer which take advantage of his employee's sex or threaten to disrupt her marital relationship is comparable to that recognized in the *Frampton* or *Petermann* cases. However, the New Hampshire court did not grant relief in order to prevent circumvention of a specific statutory policy but declared that bad faith dismissals were not in "the best interest of the economic system or the public good."[14] Employees are certain to urge courts in other jurisdictions to abandon the traditional rule, and the rationales which have been advanced to support a cause of action will be critically examined.

A limitation on the power of termination of an at will agreement could be discussed in the language of contract. It may be convincingly argued, for instance, that every at will contract is subject to an implied condition that it cannot be terminated for reasons which contravene vital public policy. Such an implied condition could be regarded as a recognition that certain social or economic policies are stronger than the policy of allowing parties unbridled freedom to

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other, the courts have exhibited greater solicitude for the tenant. *See, e.g.*, Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968); Aweeka v. Bonds, 20 Cal. App. 3d 278, 97 Cal. Rptr. 650 (1971); Wilkins v. Tebbetts, 216 So. 2d 477 (Fla. App. 1968); Sargent v. Ross, 113 N.H. 388, 308 A.2d 528 (1973); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Dickhut v. Norton, 45 Wis. 2d 389, 173 N.W.2d 297 (1970).

11. 297 N.E.2d 425 (Ind. 1973).

12. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

13. Frampton v. Central Indiana Gas Co., 297 N.E.2d 425, 428 (Ind. 1973); Petermann v. Teamsters Local 396, 174 Cal. App. 2d 184, 188-89, 344 P.2d 25, 27 (1959).

14. Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974).

contract. It may be advisable, however, to resort to such a limitation only with caution.

If such a power is to be recognized, should it be restricted to the protection of the employee? There may be instances in which the employee's arbitrary termination of an at will contract can cause considerable harm to his employer, and the employer would argue that he should likewise be accorded protection. There come to mind exclusive agency contracts of long standing whose arbitrary termination by the representative could work a serious injury on the principal by leaving him suddenly without representation in an important trade area. Sound business judgment in the interest of flexibility frequently dictates that certain agency agreements be left vague or informal as to termination. Abuse of such latitude, if prompted by some predatory interest of the agent, might well be discountenanced by a court.[15]

A policy that delimits the power to terminate an at will employment contract implicitly recognizes the notion that the contract can be terminated for some purposes but not for others. This poses a difficult question: what purposes are to be recognized? Although in the instant case the court indicated that the employer's "bad faith or malice" in discharging the employee was of controlling importance,[16] significantly, it offered no suggestion as to the intended meaning of these terms.[17] Since the plaintiff was a married woman, the foreman's urging could have been construed as an invitation to immoral behavior. Perhaps the court's attitude would have been less

15. *Cf. A.S. Rampell, Inc. v. Hyster Co.*, 3 N.Y.2d 369, 144 N.E.2d 371, 165 N.Y.S.2d 475 (1957), in which the representative had contracts with his employees and with his manufacturer. When the employees and the manufacturer conspired in a plan to set up a competitive dealership through resources of plaintiff's business, the plaintiff's need for protection against termination of the contracts was recognized in the context of third party interference with contractual relations. However, since there is generally a relative equality of bargaining power between the parties in such business relationships, it may be argued that there is no necessity for judicial intervention.

16. Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974).

17. In the context of interference with contractual relations, Professor Prosser has stated: "Here, as so often elsewhere in the law of torts, the law has been vexed with the unhappy word 'malice.' . . . [I]t now has all shades of meaning from active malevolence, through an intent to profit at the expense of the plaintiff, to a mere intent with knowledge of his interests to do an act which will have the effect of interfering with them. Obviously such a term is to be avoided for the sake of clarity." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 928 (4th ed. 1971) (footnotes omitted). *See also id.* §§ 113, 119; Brown, *The Rise and Threatened Demise of the Prima Facie Tort Principle*, 54 NW. U.L. REV. 563 (1959); Fridman, *Malice in the Law of Torts*, 21 MOD. L. REV. 484 (1958); Green, *Relational Interests*, 29 ILL. L. REV. 1041 (1935); Jaffin, *Theorems in Anglo-American Labor Law*, 31 COLUM. L. REV. 1104 (1931).

protective if the employee had been a single woman. One is led to conjecture even further as to what the consequences would have been if the employee had been dismissed because of her physical appearance, moral attributes or social behavior outside of the employment relationship.

Although the court in the principal case expressly relied upon breach of contract as the basis for its decision,[18] the question remains whether the same result might appropriately have been reached under some tort theory.[19] Certainly the interest of a party in the enjoyment of an at will contract has been protected under tort theory in those instances where a third person has intervened and induced a breach.[20] In such cases, however, the claim is against someone who is not a contracting party and yet has intermeddled with the affairs of those who have contracted for their own benefit.[21]

In addition, a recovery based on tort might arguably be rationalized in terms of the so-called prima facie tort doctrine,[22] under which intentional or malicious harm not falling within one of the specific tort classifications has been regarded as actionable in the absence of some affirmative showing of justification for the defendant's conduct.[23] In the *Frampton* case heretofore discussed, the Court's lan-

18. Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974). For discussion of other contractually related grounds which have been suggested as affording possible bases for liability in abusive discharge cases, see Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1419-21 (1967); Comment, 23 BUFFALO L. REV. 211, 231-40 (1973).

19. *See, e.g.*, Frampton v. Central Indiana Gas Co., 297 N.E.2d 425 (Ind. 1973); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974) (dicta). *See generally* Blades, *supra* note 18, at 1421-27.

20. *E.g.*, Truax v. Raich, 239 U.S. 33 (1915); American Sur. Co. v. Schottenbauer, 257 F.2d 6 (8th Cir. 1958); United States Fidelity & Guar. Co. v. Millonas, 206 Ala. 147, 89 So. 732 (1921); Mendelson v. Blatz Brewing Co., 9 Wis. 2d 487, 101 N.W.2d 805 (1960). *See also* RESTATEMENT OF TORTS § 766(b) (1939). Louisiana, however, is the only remaining American jurisdiction where inducement of breach of contract is not regarded as an actionable wrong. Cust v. Item Co., 200 La. 515, 8 So. 2d 361 (1942); Roussel Pump & Elec. Co. v. Sanderson, 216 So. 2d 650 (La. App. 4th Cir. 1968).

21. "The defendant's breach of his own contract with the plaintiff is of course not a basis for the tort." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 934 (4th ed. 1971).

22. *See* Geary v. United States Steel Corp., 319 A.2d 174, 177 (Pa. 1974) (dicta); Blades, *supra* note 18, at 1421-27. *See also Workmen's Compensation—Employer's Tort Liability—Indiana Supreme Court Allows Workman Tort Remedy Against Former Employer for Retaliatory Discharge After Employee Filed Workmen's Compensation Claim*, 35 A.T.L.A. L.J. 150, 162 (1974).

23. *See, e.g.*, Aikens v. Wisconsin, 195 U.S. 194 (1904); Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946); Beardsley v. Kilmer, 236 N.Y. 80, 140 N.E. 203 (1923). *See also* Deon v. Kirby Lumber Co., 162 La. 671, 111 So. 55 (1926); Graham v. St. Charles St. R.R., 47 La. Ann. 214, 16 So. 806 (1895). *See*

guage is suggestive of such an approach.[24] Indeed, the majority observed, without elaboration, that "such a discharge would constitute an intentional, wrongful act on the part of the employer for which the injured employee is entitled to be fully compensated in damages."[25] Nevertheless, the prima facie tort theory, although staunchly sponsored in many quarters,[26] has not been accorded general recognition in most jurisdictions.[27] Thus, it is far from certain that the courts will use the approach to justify a departure of such potential significance to the employment relationship.

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generally Brown, *supra* note 17; Forkosch, *An Analysis of the "Prima Facie Tort" Cause of Action*, 42 CORN. L.Q. 65 (1957); Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894); Note, 52 COLUM. L. REV. 503 (1952). Closely akin to this doctrine is the civil law principle of abuse of right which is based on the notion that a right is limited not only in its extent, but also in its exercise, and that there is therefore an abuse of right if it is exercised solely with the intention of injuring another. *See generally* Gutteridge, *Abuse of Rights*, 5 CAMB. L.J. 22 (1933); Mayrand, *Abuse of Rights in France and Quebec*, 34 LA. L. REV. 993 (1974); Walton, *Motive as an Element in Torts in the Common and in the Civil Law*, 22 HARV. L. REV. 501 (1909). In Louisiana, however, application of this principle has been limited to cases involving abuse of the right of ownership of property. *See, e.g.*, Higgins Oil & Fuel Co. v. Guaranty Oil Co., 145 La. 233, 82 So. 206 (1919); Adams v. Grigsby, 152 So. 2d 619 (La. App. 2d Cir. 1963); Parker v. Harvey, 164 So. 507 (La. App. 2d Cir. 1935). *See also* Yiannopoulos, *Civil Responsibility in the Framework of Vicinage: Articles 667-69 & 2315 of the Civil Code*, 48 TUL. L. REV. 195 (1974).

24. *See* text at note 11 *supra*.

25. Frampton v. Central Indiana Gas Co., 297 N.E.2d 425, 428 (Ind. 1973).

26. *See, e.g.*, Brown, *supra* note 17; Forkosch, *supra* note 23; Halpern, *Intentional Torts and the Restatement*, 7 BUFFALO L. REV. 7 (1957); Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894).

27. *See, e.g.*, Annot., 16 A.L.R.3d 1191 (1967).